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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 872

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

COMMONWEALTH OF VIRGINIA AT THE RELATION OF H. G. SHIRLEY, STATE HIGHWAY COMMISSIONER OF VIRGINIA.

APPEAL FROM THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

JURISDICTIONAL STATEMENT OF APPELLANT.

Southern Railway Company, appellant, applicant for appeal herein to the Supreme Court of the United States from the judgment of the Supreme Court of Appeals of the State of Virginia, dated and filed on the 12th day of January, 1933, in accordance with the re-

quirements of Rule 12, paragraph 1, of the Rules of the Supreme Court of the United States, herewith presents this separate typewritten statement as to jurisdiction of the Supreme Court of the United States.

I.

Basis Upon Which it is Contended That the Supreme Court of the United States Has Jurisdiction Upon Appeal to Review the Judgment in Question.

The judgment of the Supreme Court of Appeals of the State of Virginia dated and filed on the 12th day of January, 1933, herein, is a final judgment in a suit in the highest court of the State of Virginia in which a decision in the suit could be had, where is drawn in question the validity of a statute of the State of Virginia, and of proceedings had pursuant solely to the supposed authority of that statute, on the ground of its (the statute's) being repugnant to the Constitution of the United States, and the decision is in favor of its validity.

II.

The Statutory Provision Believed to Sustain the Jurisdiction.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States upon appeal to review the judgment in question is Section 237 of the Judicial Code of the United States, as amended by the Act of February 13, 1925, Chapter 229, 43 Stat. 936, 28 U. S. C. 344*a*, as in effect prior to and at the enactment of the Act of January 31, 1928,

Chapter 14, 45 Stat. 54, 28 U. S. C. 861*a*, 861*b*, and of the amendatory Act of April 26, 1928, Chapter 440, 45 Stat. 466, 28 U. S. C. 861*b*, and as amended by and pursuant to the provisions of the said two last mentioned Acts of the year 1928.

III.

The Statute of the State of Virginia the Validity of Which is Involved.

The statute of the State of Virginia, the validity of which is involved, is Chapter 62 of the Acts of the General Assembly of the State of Virginia, Session 1930, approved February 27, 1930, official volume Acts of Assembly, Virginia, 1930, beginning at page 73 and ending on page 75, entitled:

> "An act to amend and re-enact an Act entitled 'An Act to amend and re-enact an Act entitled an Act to provide for the construction of overhead and underpass crossings of railroads by State highways, and for the elimination of existing grade crossings on State highways, and to provide for the payment of the costs thereof, approved March 7, 1924, approved March 19, 1926' " (S. B. 115).

In its provisions pertinent to the question here raised, the said statute provides:

> "* * * Whenever the elimination of an existing crossing at grade of a State road by a railroad, or a railroad by a State road, and the substitution therefor of an overhead * * * crossing becomes, *in the opinion of the State Highway Commissioner,* necessary for public

safety and convenience, * * * *the State Highway Commissioner shall notify in writing* the railroad company * * * upon which the existing crossing at grade * * * is, * * * *Stating particularly the point at which* * * * *the existing grade crossing is to be eliminated* * * * *and that the public safety or convenience requires* that the crossing be made * * * * above * * * the tracks of said railroad, or that the existing grade crossing should be eliminated or abolished, and a crossing constructed above * * * the tracks of said railroad, * * *, and shall submit to said railroad company plans and specifications of the proposed work, the said crossing to be deemed to start at the points on each side of the tracks of the railroad where the grade under the plans and specifications herein provided for leaves the ground line of the State road to go over * * * the tracks of the railroad, and to include all work and structures between said points. *It shall thereupon be the duty of the railroad company to provide all equipment and materials and construct the overhead* * * * *crossing,* * * * in accordance with the plans and specifications submitted by the State Highway Commissioner, within its right of way limits and the State Highway Commissioner such portion outside of said railroad right of way limits or such other division of the work as may be mutually agreed on." (Italics added.)

There follow, in the statute, other pertinent provisions: (1) authorizing the railroad, if dissatisfied with the plans and specifications submitted by the State Highway Commissioner, to petition the State Corporation Commission, setting out its objections thereto and

recommending plans and specifications in lieu thereof, and authorizing the Commission to hear the complaint, solely as to the plans and specifications, and to approve those submitted by the Highway Commissioner, or others in lieu thereof; (2) undertaking to make it the railroad's duty, in such event, to furnish materials and construct in accordance with the plans and specifications approved by the Corporation Commission; and (3) purporting to impose on the railroad one-half the total cost of the work done both by it within, and by the Highway Commission without, the right of way limits, and the obligation to maintain the portion within the right of way lines, except the surface of the roadway.

IV.

Date of Judgment Sought to be Reviewed and of Application for Appeal.

The judgment of the Supreme Court of Appeals of Virginia, sought to be reviewed, was dated, filed and entered on the 12th day of January, 1933.

The application for appeal was presented on the 15th day of March, 1933.

V.

Nature of the Case and Rulings of the Court Bring the Case Within the Jurisdictional Provision Relied on.

From the quotation from and summary of pertinent provisions of the statute above, it will be observed that the statute contains no provision requiring the Highway Commissioner to give the railroad company

notice or to allow it a hearing before he makes his finding and determination that in his opinion public safety and convenience require the elimination of the grade crossing and the substitution of the overhead crossing at the expense, in part, of the railroad. It lays down no rule of law, sets no legislative standard, to control the arbitrary personal or official "opinion" of the Highway Commissioner that public safety and convenience require such elimination construction. It does not require the Highway Commissioner to take or consider or to give legal effect to evidence, to hold a hearing, or to give the railroad opportunity to object or to be heard on the merits of the fundamental question of public safety and convenience. It provides for no semblance of primary, procedural due process of law. It undertakes to confer on the Highway Commissioner, an administrative official, an uncontrolled and purely personal and arbitrary power to make a determination and requirement which will take the railroad's property, without notice, without hearing, without right to contest, without evidence, merely upon his *ex parte* opinion, by mere administrative fiat.

Moreover, there is no provision in the statute for appeal from the determination and requirement made by the Highway Commissioner or for a judicial review in any forum of the merits of his finding that in his opinion public safety and convenience require the overhead crossing to be provided. There is no provision in the statute law of Virginia for such appeal and judicial review. The Act of 1930, here drawn in question, undertakes not only to confer on the Highway

Commissioner the power to take the railroad's property by an arbitrary exercise of personal and uncontrolled discretion, by administrative fiat, and without notice and hearing, but also to make that exercise of arbitrary discretion final and unappealable and subject to no judicial review.

The only steps required by the statute to be taken by the Highway Commissioner, in order to create and finally impose upon the railroad the supposed legal "duty" to provide equipment and materials and construct, are:

> 1. That he determine in his *ex parte* opinion that public safety and convenience require the elimination construction;
>
> 2. That, after his opinion is formed and his determination made, he then notify the railroad in writing, stating particularly the point at which the existing grade crossing is to be eliminated and that the public safety or convenience requires it;
>
> 3. That he submit plans and specifications for the work.

Acting solely under the supposed authority of that statute, H. G. Shirley, the relator appellee, as Highway Commissioner of Virginia, without giving notice to appellant and without affording it a hearing, pursuant to no semblance of due process of law in the primary or procedural sense, but following only the steps set out in the statute, and acting merely in the forum of his own mind and discretion, determined by personal

or administrative fiat that in his opinion public safety and convenience required the elimination of an existing grade crossing of State Highway Route 12 with appellant's railroad near Antlers, Mecklenburg County, Virginia, and the substitution in lieu thereof of an overhead highway crossing over the track and right of way of appellant.

He thereupon gave appellant notice in writing, dated January 7, 1931, that he had formed that opinion and made that determination, with which notice he submitted plans and specifications for the work, and in which notice he called upon appellant to "proceed forthwith to provide the equipment and materials and construct the overhead crossing in accordance with the plans and specifications herein submitted, within the right of way limits."

Appellant replied to that notice and requirement by letter dated January 20, 1931, in which it said that it did not agree with the Highway Commission's opinion that the public safety and convenience required the said elimination construction, and asserted that the Act of 1930 was unconstitutional and void. It advised that, "therefore, unless and until it should be finally determined by the courts that it is a valid statute, this Company cannot recognize that it is under any legal duty to provide equipment and materials or to construct an overhead crossing, as directed by your letter of January 7th."

Upon the receipt of appellant's letter of January 20, 1931, without any further intermediate handling with appellant, the Highway Commissioner, as relator for

the Commonwealth of Virginia, complainant, filed a complaint against appellant, as defendant, in the State Corporation Commission of Virginia, seeking an order of that Commission to compel the appellant to perform the supposed "duty," to provide all equipment and materials and to construct the overhead bridge, a duty alleged to have been imposed upon appellant by the foregoing acts of the Highway Commissioner under the Act of 1930.

The material allegations of the complaint were: that the Highway Commissioner, acting under authority of the Act of 1930, had in his official capacity ascertained and determined that the grade crossing should be eliminated and the overhead crossing substituted and that this was necessary for public safety and convenience; that he had given notice of that determination to appellant as required by the Act of 1930; that he had submitted plans and specifications for the work; that it thereupon became the legal duty of appellant to provide all equipment and materials and to construct the overhead crossing in accordance with the plans and specifications, and as he had called upon appellant to do; that appellant had failed and refused to obey and perform said duty, it asserting the claim of unconstitutionality of the statute; that the cost of the work when done would be divided half and half between the Commonwealth and appellant as provided by the Act of 1930; that the Corporation Commission had constitutional and statutory jurisdiction to receive the complaint, to ascertain and determine whether or not appellant had failed or refused or was failing to

comply with the said duty, and to impose fines and otherwise enforce performance by it of said duty.

The appellant demurred to the complaint on the grounds, as specifically detailed in the demurrer, that the complaint did not state a cause of action in that the Act of 1930 was unconstitutional, null and void as denying primary or procedural due process of law, in violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States and of the due process clause of Article I, Section 11, of the Constitution of Virginia, in the respects particularly detailed in the demurrer and summarized hereinbefore in pointing out the defects in the statute, in that the acts of the Highway Commissioner pursuant to such unconstitutional statute were null and void and imposed no enforcible or constitutional legal duty on appellant, and that for the Commission to grant the prayer of the complaint would be beyond its jurisdiction and would take appellant's property without due process of law in violation of said constitutional provisions.

The Federal constitutional question was thus squarely, explicitly and in detail raised in the outset by the demurrer.

There was no issue of fact before the Corporation Commission. It had for decision only the squarely raised legal issue as to the constitutionality of the Act of 1930 and of the acts of the Highway Commissioner thereunder, and whether any constitutionally enforcible legal duty had been imposed on appellant thereby.

No question was raised by appellant of the substantive police power of the State. It has expressly admitted throughout the case the substantive police power to make reasonable requirements, enforcing uncompensated obedience thereto by railroads, to promote public safety and convenience by contributing their own property to the construction of grade crossing elimination structures reasonably necessary to protect the public, provided such requirements be imposed by due process of law in the primary or procedural sense.

The demurrer challenged the constitutionality of the Act of 1930, and of the acts of the Highway Commissioner thereunder, on the theory that it was repugnant to the Fourteenth Amendment in denying appellant due process of law in the primary or procedural sense, in undertaking to delegate to a single administrative officer the uncontrolled and arbitrary discretion and power to make such a requirement in a particular instance, without notice, without hearing or right to be heard, hence by necessarily arbitrary administrative fiat, final and irrevocable in its nature and subject to no appeal or judicial review on the merits.

The Corporation Commission, after argument and reargument, handed down an elaborate opinion on March 8, 1932, in which it held that, because the Act of 1930 was a grade crossing elimination statute enacted under the police power, it was constitutional and valid although it denied appellant right to notice and

hearing before the determination and requirement made by the Highway Commissioner became final, and although it denied appellant appeal and judicial review of the merits thereof thereafter, making the Highway Commissioner's administrative fiat final and irrevocable. The substance and effect of the elaborate opinion is that, although admitting that such a statute would be repugnant to the Fourteenth Amendment if passed under the State's taxing power, or its power of eminent domain, or its power to impose assessments for local benefits, yet the police power of the State is so transcendental and farreaching as to be free from the procedural requirements of due process which admittedly restrain all other manifestations of the State's power.

Upon that opinion, the Corporation Commission overruled the demurrer. The appellant stood upon the demurrer. Thereupon the Commission ordered appellant to "forthwith proceed to provide all equipment and material, and to construct" the highway bridge within its right of way limits, pursuant to the Highway Commissioner's requirement, but stayed its own order pending appeal.

Under statutes conferring right of appeal from any order of the Corporation Commission, appellant appealed from the Commission's judgment and order direct to the Supreme Court of Appeals of Virginia, its assignments of error bringing in question the validity of the Act of 1930, and of the acts of the Highway Commissioner and the enforcing order of the Corporation

Commission thereunder, as being repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States (and to the like clause of Article I, Section 11, of the Constitution of Virginia), on the same grounds asserted and relied on by appellant in its demurrer below.

The issue before that court was the same as before the Corporation Commission, that is, as to constitutionality of the Act of 1930, and of the determination and requirement of the Highway Commissioner and enforcing order of the Corporation Commission depending solely on that Act for authority, in view of the denial by that statute to appellant, and of the Highway Commissioner's denial to appellant pursuant to the terms of the statute, of primary due process of law, of due process in the procedural sense.

The Supreme Court of Appeals of Virginia decided, by a divided court, Campbell, Chief Justice, and Epes, J., dissenting, in favor of the validity and constitutionality of the statute, as against appellent's assertion of its repugnancy to the due process clause of the Fourteenth Amendment, in the opinion and judgment rendered January 12, 1933, here appealed from.

The majority of that court adopted the view of the Corporation Commission, that the State's police power is a power of such broad and untrammelled scope as to be free from the procedural requirements of due process of law, in the primary sense of that expression in the Fourteenth Amendment, and that it is constitutional for the State, in an enactment made under the

police power, to delegate to an administrative official the power to make a final and irrevocable determination and requirement, obedience to which will require appellant to expend its own money and devote part of its own right of way to a public purpose, without notice and hearing and without any legal right to notice and hearing given by the law itself.

Appellant in that court, conceding entirely the substantive police power of the State to force a railroad to expend its own property for reasonably necessary grade crossing eliminations, where such requirements are imposed after notice and full hearing as matter of right and with right to judicial review on the merits, as decided by this Court in the line of cases represented by *New York, etc., Ry Co.* v. *Bristol,* 151 U. S. 556, *Erie R. R. Co.* v. *Public Utility Commissioners,* 254 U. S. 394, and *Lehigh Valley, etc., R. Co.* v. *Commissioners,* 278 U. S. 24, pointed out that in every one of that line of cases the statute involved complied fully with the procedural requirements of the due process clause of the Fourteenth Amendment, made notice and hearing before the imposition of the requirement obligatory and a matter of right, conferred the right of review on the merits after the requirement was made, and that the requirements in all those cases were imposed with strict compliance with these requisite procedural guaranties. It further pointed out that every grade crossing elimination statute which it had found in the books, except the Virginia Act of 1930, made the same careful provisions for notice, hearing,

and review, and that the Virginia Act was entirly unique in its denial of the procedural guaranties.

As to this the Corporation Commission, in its opinion below, had said:

> "It is true that the statutes involved in those cases did require such notice, and the courts in considering such questions and the contention that the statutes deprived the defendant of property without due process of law, referred to the fact that the statutes did provide for notice or an opportunity to be heard; but the fact that they did so is not to be taken as a holding that notice to or an opportunity to be heard was essential to due process of law.
>
> "While nearly all of the statutes involving the alteration or abolition of grade crossings, whenever in the opinion of the administrative body the public safety or convenience requires such alteration or abolition, provide for a hearing, yet there is no case which holds that notice of a hearing and an opporthunity to be heard are absolutely necessary."

The Supreme Court of Appeals did not expressly advert in its opinion to the distinction drawn between this statute and the statutes involved in the decided cases, but it held that the Virginia Act was valid, although it denied right to notice and hearing and conferred on an administrative official power to make a *final* requirement that the railroad expend its property, time and labor, without notice and hearing. It relied upon broad statements of this Court, made in cases involving only the substantive scope of the police power,

not the procedural limitations imposed thereon by the due process clause, such as the statement in *New Orleans Public Service Co.* v. *City of New Orleans,* 281 U. S. 682, that, "It is elementary that enforcement of uncompensated obedience to a regulation passed in the legitimate exertion of the police power is not a taking of property without due process of law." And it overruled appellant's contention that the word "legitimate" in such statements implies the necessity of procedural due process, notice and hearing as matter of right, and right to review on the merits, where the State undertakes to delegate the exercise of its police power to administrative officials.

VI.

Cases Believed to Sustain the Jurisdiction.

As to the repugnancy of the statute to the Fourteenth Amendment to the Constitution of the Unied States, in denying due process of law in the primary or procedural sense, appellant relies on the following cases, *inter alia*:

Yick Wo v. *Hopkins,* 118 U. S. 356;
Chi., M. & St. P. R. Co. v. *Minnesota,* 134 U. S. 416;
Smythe v. *Ames,* 169 U. S. 466;
Parsons v. *District of Columbia,* 170 U. S. 45;
Chi., M. & St. P. R. Co. v. *Tompkins,* 176 U. S. 167;

Security Trust & Sav. Co. v. *Lexington*, 203 U. S. 323;
Tracy v. *Ginzberg*, 205 U. S. 127;
Central Ga. R. Co. v. *Wright*, 207 U. S. 127;
Missouri P. R. Co. v. *Nebraska*, 217 U. S. 196;
Washington ex rel. Oregon R. & N. Co. v. *Fairchild*, 224 U. S. 510;
Eubank v. *Richmond*, 226 U. S. 137;
Interstate Commerce Commission v. *Louisville & Nashville R. Co.*, 227 U. S. 88;
Coe v. *Armour Fertilizer Works*, 237 U. S. 413;
Embree v. *Kansas City, etc., Road District*, 240 U. S. 242;
Witherell v. *Ruecking Construction Co.*, 249 U. S. 62;
Oklahoma Operating Co. v. *Love*, 252 U. S. 331;
Turner v. *Wade*, 254 U. S. 64;
United States v. *Cohen Grocery Co.*, 255 U. S. 81;
Truax v. *Corrigan*, 257 U. S. 312;
Wichita R. R. & L. Co. v. *Public Utilities Commission*, 260 U. S. 48;
Adkins v. *Children's Hospital*, 261 U. S. 525;
Small v. *Sugar Refining Co.*, 267 U. S. 233;
Connally v. *General Construction Co.*, 269 U. S. 385;
Browning v. *Hooper*, 269 U. S. 396;
Clive v. *Frick Dairy Co.*, 274 U. S. 445;
Washington ex rel. Seattle Trust Co. v. *Roberge*, 278 U. S. 116;
Brinkerhoff-Faris Co. v. *Hill*, 281 U. S. 673;

Marx v. *Maybury*, 36 F. (2d) 297;
Chi., M. & St. P. R. Co. v. *Board of Railroad Commissioners*, 76 Mont. 305, 247 Pac. 162.

As to the right of appeal to this Court, cases believed to sustain the jurisdiction are:

Saltonstall v. *Saltonstall*, 276 U. S. 260;
Miller v. *Schoene*, 276 U. S. 272;
Nashville, C. & St. L. Ry. v. *White*, 278 U. S. 456;
Great Northern Ry. Co. v. *Minnesota*, 278 U. S. 503;
Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313, 320;
Home Ins. Co. v. *Dick*, 281 U. S. 397, 407;
Abie State Bank v. *Bryan*, 282 U. S. 765, 767-768, 771-773;
Bandini Petroleum Co. v. *Superior Court*, 284 U. S. 8, 14;
Lawrence v. *State Tax Commission*, 286 U. S. 276, 278-279;
Advance-Rumely Thresher Co. v. *Jackson*, 287 U. S. 283, 77 L. Ed. (Adv.) 192, decided Dec. 5, 1932;
Detroit International Bridge Co. v. *Corporation Tax Appeal Board*, 287 U. S. 295, 77 L. Ed. (Adv.) 197, 198, decided Dec. 5, 1932;
Atlantic Coast Line R. Co. v. *Ford*, 287 U. S. 502, decided Jan. 9, 1933;
Guaranty Trust Co. of N. Y. v. *Blodgett*, 287 U. S. 509, decided Jan. 9, 1933.

It is, therefore, respectfully submitted that this Court has jurisdiction of this appeal by virtue of Section 237*a* of the Judicial Code, 28 U. S. C. 344*a*, as amended.

Respectfully submitted,

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